Lee Chin Ho & Anor v Syed Hussein bin Salim Al-Attas & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–112 OF 1999
ZAINUN ALI J
17 APRIL 2000

Civil Procedure *— Affidavits — Defective affidavit — Affidavit affirmed by solicitor on behalf of client — Authority to affirm affidavit in application for certificate of urgency, whether necessary requisite — Affidavit lacked particularisation — Whether deponent must identify original source of information — Whether affidavit regular and admissible*

The plaintiff made an application to extend time to file an affidavit in reply under O 3 r 5(1) of the Rules of the High Court 1980 ('the RHC'). The application was supported by an affidavit (encl 14) affirmed by Ms Rachel Chacko, the plaintiff's solicitor. Ms Chacko put in a certificate of urgency for an early hearing date and affirmed the affidavit because her client was unable to give her instructions since he was admitted to hospital to undergo surgery. The affidavit was accompanied by exh RC-1 that gave estimate of the medical charges of the plaintiff. However there was nothing in the affidavit that gave explanation in explicit terms as to how Ms Chacko came by the said exhibit. The defendant argued that the affidavit was defective since Ms Chacko had no authority to depose to the affidavit and had not disclosed the source of information and belief in her affidavit.

Held:

(1) Authority is not a prerequisite to swearing an affidavit under O 41 r 5(2) of the RHC (see p 51G); *Sykt Ying Mui Sdn Bhd v Muthusamy* [2000] 1 AMR 830 followed.

(2) The purpose of O 41 r 5(2) is to enable a deponent to put before the court, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove. At the interlocutory stage, a deponent need not be constrained to identify only the original source of information since this would preclude any intermediate source (see p 53C, F).

(3) The body of Ms Chacko's affidavit lacked particularisation of the source or ground of her information. However, the omission would not render her affidavit irregular and inadmissible. Exhibit RC-1 manifested itself as the source of information and such an appendage must surely count for something despite the omission to particularise. In any case, the defendant had not seriously challenged the authenticity of exh RC-1, in as much as it formed as part of the affidavit. The omission should not preclude the court from accepting the affidavit since after a critical appraisal of the affidavit and after considering due weight to be attached to it,

A the court was satisfied that the affidavit was plausible and acceptable (see p 54D–G).

[Bahasa Malaysia summary

B Plaintif telah membuat suatu permohonan untuk melanjutkan masa untuk memfailkan satu afidavit jawapan di bawah A 3 k 5(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Permohonan tersebut telah disokong oleh satu afidavit (lampiran 14) yang disahkan oleh Cik Rachel Chacko, peguamcara plaintif. Cik Chacko telah memasukkan satu perakuan segera untuk satu tarikh awal dan mengesahkan afidavit C tersebut kerana anakguam beliau tidak dapat memberikan arahan kerana telah dimasukkan ke hospital untuk menjalani pembedahan. Afidavit tersebut telah disertai eksh RC-1 yang memberikan anggaran caj perubatan plaintif. Bagaimanapun tiada apa-apa di dalam afidavit yang memberikan penjelasan dalam terma yang sangat jelas tentang bagaimana Cik Chacko mendapat ekshibit tersebut. Defendan D menghujahkan bahawa afidavit tersebut adalah cacat kerana Cik Chacko tidak mempunyai kuasa untuk memberikan keterangan bersumpah terhadap afidavit tersebut dan tidak mendedahkan sumber maklumat dan kepercayaan dalam afidavit beliau.

E **Diputuskan**:

(1) Ada atau tiadanya authoriti bukan merupakan satu kewajipan kepada mengangkat sumpah satu afidavit di bawah A 41 k 5(2) KMT (lihat ms 51G); *Syarikat Ying Mui Sdn Bhd v Muthusamy* [2000] 1 AMR 830 diikut.

F (2) Tujuan A 41 k 5(2) adalah untuk membolehkan seorang deponen mengemukakan ke mahkamah, selalunya di dalam keadaan yang memerlukan tindakan segera, fakta-fakta yang beliau tidak dapat perolehi dalam pengetahuan sendiri untuk membuktikan. Pada peringkat interlokutori, seorang deponen tidak perlu dipaksa untuk hanya mengenalpasti sumber maklumat G asal kerana ini akan menghalang apa-apa sumber perantaraan (lihat ms 53C, F).

(3) Badan afidavit Cik Chacko kekurangan pembutiran sumber atau alasan maklumat beliau. Namun begitu, peninggalan tersebut tidak akan menyebabkan afidavit beliau di luar aturan dan tidak H boleh diterima. Ekshibit RC-1 adalah jelas dengan sendirinya satu sumber maklumat dan apendej sebegini semestinya diambil kira sebagai sesuatu walaupun terdapat peninggalan untuk pembutiran. Dalam apa keadaan, defendan tidak dengan serius mencabar kebolehpercayaan eksh RC-1, sejauhmana ia membentuk sebahagian daripada afidavit tersebut. Peninggalan I tersebut hendaklah tidak menghalang mahkamah daripada menerima afidavit tersebut kerana setelah satu penilaian kritikal afidavit tersebut dan setelah mempertimbangkan beban

sewajar yang terikat padanya, mahkamah berpuas hati bahawa afidavit tersebut adalah munasabah dan boleh diterima (lihat ms 54D–G).] A

Notes

For cases on defective affidavit, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 249–215. B

Cases referred to

Bains Harding (M) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd & Ors [1996] 1 MLJ 425 (refd) C

Datin Melati Abdullah & Ors v Syed Hassan Syed Salim [1999] 5 CLJ 582 (refd)

Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd & Ors [1994] 4 All ER 181 (refd)

Dynacast (S) Pte Ltd v Lim Meng Siang & Ors [1989] 3 MLJ 456 (refd) D

Gulwant Singh v Amar Kaur [1968] 1 MLJ 107 (refd)

Hinchliffe, Re [1895] 1 Ch 117 (refd)

Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors [1997] 5 MLJ 77 (refd)

MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1999] 1 AMR 810 (refd) E

Madan Theatres Ltd v Hari Das AIR 1936 Lah 33 (refd)

Moritz, Re; Midland Bank Executor and Trustee Co Ltd Forbes & Ors [1959] 3 All ER 767 (refd)

Palaniappa Chettiar v Tan Jan & Anor [1965] MLJ 182 (refd) F

Sarkawi b Sadijo v BMG Music (M) Sdn Bhd [1996] 4 MLJ 515 (refd)

Saving & Investments Bank Ltd v Gasco Investment (Netherlands) BV & Ors [1984] 1 WLR 271 (refd)

Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348 (refd)

Syarikat Ying Mui Sdn Bhd v Muthusamy [2000] 1 AMR 830 (folld) G

Legislation referred to

Rules of the High Court 1980 O 3 r 5(1), O 41 r 5(2)

Rachel Chacko (*Johanan Puthucheary* and *KL Low* with her) (*Tea, Kelvin Kang & Co*) for the plaintiffs. H

Robert Lai (*Fadzilah bte Mansor* with him) (*Jackson & Masacorale*) for the defendants.

Zainun Ali J: The plaintiff's application to extend time to file an affidavit in reply under O 3 r 5(1) of the Rules of the High Court 1980 ('the RHC'), I was supported by an affidavit encl 14, affirmed by the plaintiff's counsel, Ms Rachel Chacko.

A The plaintiff's application was in response to the defendant's application to strike off the order given on 13 May 1999 by this court, allowing the plaintiff's ex parte application to extend the validity of a private caveat until the disposal of the case.

When the matter came up before the senior assistant registrar ('the B SAR'), the SAR struck off the plaintiff's affidavit on the ground that the plaintiff's affidavit was defective and ordered the plaintiff to refile a fresh affidavit. The plaintiff had since filed a fresh affidavit, marked as encl 20.

The defendant, aggrieved by the SAR's decision now appeals that decision before the judge in chambers and strenuously argued that the SAR ought to have struck off the whole of the plaintiff's application in encl 15 C together with the plaintiff's supporting affidavit in encl 14. Mr Robert Lai for the appellant (defendant) submitted that the SAR was wrong in striking off only encl 14 since among other things, a defective affidavit which does not contain the source of information and belief is irregular and inadmissible as evidence.

D *The appellant (defendant)'s case*

It was submitted by Mr Robert Lai that the plaintiff's affidavit at encl 14 was defective since Ms Rachel Chacko for the plaintiff had no authority to depose to the affidavit, and to exacerbate the matter, had not disclosed the source of information and belief in her affidavit in support. Counsel cited E *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1999] 1 AMR 810 to support his contention on the requisite authorisation.

In addition, counsel cited *Datin Melati Abdullah & Ors v Syed Hassan Syed Salim* [1999] 5 CLJ 582 to support his argument on the requirement to disclose the source and grounds of Ms Chacko's F information and belief.

It was further argued vigorously by Mr Robert Lai that the said affidavit has no probative value since the source of information and belief is not revealed. The case of *Dynacast (S) Pte Ltd v Lim Meng Siang & Ors* [1989] 3 MLJ 456 was cited in support.

G Mr Robert Lai also cited *Madan Theatres Ltd v Hari Das* AIR 1936 Lah 33, and submitted that the deponent must state how much of the information is based on personal knowledge and how much on information and belief.

Finally Mr Robert Lai submitted that the plaintiff's application for extension of time does not contain any cogent material to satisfactorily H explain the delay. I believe this matter should be taken up at the stage when the application for extension of time is heard.

The plaintiff (respondent)'s case

Mr Johanan Puthucheary for the plaintiff responded with equal force to the I vigour given by Mr Robert Lai, and begun by saying that it is not open to the defendant's counsel to question Ms Chacko's affirmation on the affidavit at encl 14 when counsel for the defendant, Cik Fadzilah, had

herself deposed to the defendant's application at encl 16 at para 7 thereof and therefore had breached the decision of the court in *Datin Melati*'s case. In short, counsel is saying that what is good for the goose should also be good for the gander.

Mr Puthucheary went on to submit that there is no requirement under the rules for a deponent to be so authorized to affirm an affidavit under O 41 r 5(2) of the RHC. Counsel cited *Syarikat Ying Mui Sdn Bhd v Muthusamy* [2000] 1 AMR 830 in support.

It was submitted by Mr Puthucheary that Ms Chacko's affidavit is supported by an exhibit which is the estimate of the plaintiff's hospital charges, and this exhibit thus becomes part of the plaintiff's affidavit and on the strength of *Re Hinchliffe* [1895] 1 Ch 117, the source (of the information and belief) is therefore revealed.

The law

The crux of counsels' argument centred around the interpretation and construction of O 41 r 5(2) of the RHC.

It reads:

> An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

It may seem banal, but it might be useful to remember that an affidavit is a statement which is made on oath or by affirmation (a sworn statement) which may be used in evidence in a suit.

It has an important part in interlocutory processes since the rules often necessitates an application to be supported by an affidavit setting out the facts on which the party relies.

It is oft repeated that subject to certain exceptions, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

However, an exception to this is seen in the application of affidavits in interlocutory proceedings.

It is manifest in the r 5(2) of O 41 that an affidavit which is sworn for the purpose of being used in interlocutory proceedings may include statements concerning matters which the deponent is not personally aware but of which he was informed by other parties. In that connection, it is for the deponent to state the source of such information and that the deponent believes such information to be true.

What then is the rationale for this exception to the hearsay rule? This was explained in clear terms by Peter Gibson J in *Saving & Investments Bank Ltd v Gasco Investments (Netherlands) BV & Ors* [1984] 1 WLR 271 that (at p 282):

> ... the purpose (of this exception) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which,

A the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief.

Thus, under r 5(2), a deponent may give not only first hand hearsay evidence but also second hand hearsay evidence.

B To illustrate this, the deponent may say that 'I have been informed by *A* and believe that *X* ...'.

The deponent may also say 'I have been informed by A that he has been informed by *B* that *X*, which I believe ...' (see the case of *Saving & Investment Bank*'s case).

C Judicial opinion seem at odds with regard to the question whether it is sufficient to comply with r 5(2) that the deponent should identify only the source of his information even though it is clear that the source was not the original source.

In practice, it would appear that the grounds of the witness' information or belief are frequently not stated. However, there is a stricture that a D deponent should never state that he believes something unless he has applied his mind to the matter at hand and concluded that there are good grounds for his belief.

I shall firstly deal with the points raised by Mr Robert Lai for the appellant.

E Mr Robert Lai was strong in his plea that there has to be authorisation before the plaintiff's counsel could swear to an affidavit. It is essentially Mr Robert Lai's case that there is an obvious omission in this regard.

Mr Robert Lai cited *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*, where Abdul Kadir Sulaiman J held that the affidavit was F inadmissible because there was no mention in the affidavit that the deponent was duly authorized to affirm such affidavit on its behalf.

However, in *Syarikat Ying Mui Sdn Bhd v Muthusamy* Skinner JC held that there is no requirement for a deponent to be duly authorized to affirm an affidavit.

G After having read both authorities cited above, I am in agreement with the court's decision in *Syarikat Ying Mui* and thus takes the position that authority is not a prerequisite to swearing an affidavit under O 41 r 5(2) of the RHC.

Both parties expressed some disquiet over the question of counsel deposing to an affidavit, though they gave different reasons for saying so.

H However, since there are no disputed questions of fact in the present case which would put to the test the question of solicitors affirming affidavits for their clients, the problem is somehow avoided (see *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 where Edgar Joseph Jr J observed that where disputed questions of facts are involved, it I would be best that parties and not their solicitors affirm affidavits thereto).

In the instant case, Ms Chacko puts in a certificate of urgency for an early hearing date and affirmed the affidavit because her client was unable

to give her instructions since he was admitted to hospital to undergo surgery. It would be useful to append Ms Chacko's affidavit below:

Encl 14:

AFIDAVIT SOKONGAN

Saya, RACHEL CHACKO A/P THOMAS CHACKO (K/P NO: 7226424) yang beralamat di No 26, Jalan Dedap 24, Taman Johor Jaya, 81100 Johor Bahru, Johor dan beralamat di Tetuan Tea, Kelvin Kang & Company di Bilik 8.1, Tingkat 8, Menara Pelangi, Jalan Kuning, Taman Pelangi, 80400 Johor Bahru dengan sesungguhnya berikrar dan menyatakan seperti berikut:

(1) Saya adalah salah seorang peguam yang mengendalikan perkara ini.

(2) Segala yang dinyatakan di sini adalah dari pengetahuan dan dari dokumen-dokumen yang ada pada saya.

(3) Saya sesungguhnya mengatakan bahawa saya berkeupayaan menulis, membaca dan bertutur dalam Bahasa Malaysia dan memahami keseluruhan kandungan afidavit ini.

(4) Saya merujuk di sini afidavit defendan pertama dan defendan kedua yang diikrar pada 11 Oktober 1999 yang telah diserahkan pada 14 Februari 2000 bersama-sama dengan saman dalam kamar yang dimeterai.

(5) Anakguam saya tidak dapat memberi arahan untuk membolehkan saya menyediakan dan memfailkan satu afidavit jawapan, bagi pihak kedua-dua plaintif. Ini adalah kerana plaintif pertama telah baru-baru ini menjalani satu pembedahan di Gleneagles Hospital Singapura.

Oleh yang demikian, satu afidavit jawapan tidak dapat disediakan dalam jangkamasa yang ditetapkan di bawah Kaedah-Kaedah Mahkamah Tinggi 1980. Sesalinan bukti perihal kemasukan plaintif pertama ke dalam Gleneagles Hospital Singapura dilampirkan bersama-sama ini ditanda dan dieksibitkan sebagai 'RC–1'.

Oleh yang demikian, saya memohon maaf kepada mahkamah yang mulia ini dan memohon perintah-perintah yang dipohon seperti yang terkandung dalam saman dalam kamar ini.

Diikrar oleh Rachel Chacko)
a/p Thomas Chacko di Johor) tt
Bahru pada) .....
Haribulan 25 Feb 2000) RACHEL CHACKO
A/P THOMAS CHACKO

The said affidavit is accompanied by an exhibit Ex 'RC-1' which gives an estimate of the medical charges of the plaintiff.

However there is nothing in the affidavit which gives an explanation in explicit terms as to how Ms Chacko came by the said exhibit.

It has to be borne in mind that the certificate of urgency for extension of time was filed on 28 February 2000, which is the last date the affidavit in reply has to be served on the defendants under O 32 r 1(2) of the RHC, and thus the omission to state the source of information may well bear testimony to this lapse.

A In any case, the authority in *Re Hinchliffe* is still good law. This case was cited with approval in *Re Moritz; Midland Bank Executor and Trustee Co Ltd Forbes & Ors* [1959] 3 All ER 767 where Lord Herschell LC state that exhibits to an affidavit 'form as much a part of the affidavit as if they had been actually annexed to and filed with it'.

B This observation found favour with AL Smith LJ (in *Re Hinchliffe*), who said that:

> When a person makes an affidavit, and states therein that he refers to the document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense.

C This principle was applied in two local cases of *Gulwant Singh v Amar Kaur* [1968] 1 MLJ 107, and *Palaniappa Chettiar v Tan Jan & Anor* [1965] MLJ 182.

It is apparent that the purpose of r 5(2) of O 41 is to enable a deponent to put before the court, frequently in circumstances of great urgency, facts D which he is not able of his own knowledge to prove.

(See case of *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd & Ors* [1994] 4 All ER 181).

As the learned judge Philips J observed in the above case '... in a situation of urgency a plaintiff may well not have time to identify or trace E evidence which will be admissible at the trial.'

Thus if the deponent is appraised of facts through an intermediate source which there is good reason to believe will itself, have had access or a link to primary sources of information, there is no reason for denying the plaintiff from relying upon that intermediate source as a ground for seeking interlocutory relief.

F Thus at the interlocutory stage, this court agrees with the view that a deponent need not be constrained to identify only the original source of information since this would preclude any intermediate source thereof. The object of r 5(2) would certainly fly in the face of placing such an impediment upon the natural meaning of its words.

G It goes without saying of course that the weight to be attached to a statement of belief in an affidavit which depends upon sources and grounds other than the knowledge of deponent will depend upon the nature of those sources and grounds. An original source will normally be of greater probative value than would an intermediate source. Where original sources H are known, they need to be identified.

However, it does not imply for a moment that intermediate sources cannot be referred to or relied upon, for to put a restrictive ambit on r 5(2) would greatly reduce its utility. However the authorities cited by the defendant, such as *Dynacast (S) Pte Ltd v Lim Meng Siang & Ors*, goes irresistibly to the principle that an affidavit of information and belief which I does not state the source of the information or belief is irregular and therefore inadmissible in evidence. Moreover, the court in *Bains Harding (M) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd & Ors* [1996]

1 MLJ 425 held that having stated no ground for his belief, the court is to presume that the deponent of the affidavit had no grounds but only suspicion.

However, in *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 MLJ 77, it was held by Kamalanathan Ratnam JC (as he then was) at p 94 that:

> ...in interlocutory proceedings a party affirming an affidavit may make statements of information or belief. If the party fails to particularize its sources or grounds of belief, then such failure merely goes to the weight that I ought to attach to such averments.

What then is the weight to be attached to such an affidavit particularly that of the plaintiff's in the present case?

As had been made explicit in *Sarkawi bin Sadijo v BMG Music (M) Sdn Bhd* [1996] 4 MLJ 515, the weight to be attached to a statement of belief in an affidavit that depends upon sources and grounds other than the knowledge of the deponent depends on the nature of the sources and grounds.

The body of Ms Chacko's affidavit lacks particularization of the source or ground of her information. Would this omission render Ms Chacko's affidavit irregular and inadmissible?

Surely not, since exh RC-1 manifests itself as the plaintiff's source of information and such an appendage must surely count for something on the strength of *Re Hinchliffe*, despite the omission to particularize.

In any case, the defendant had not seriously challenged the authenticity of exh RC-1, in as much as it forms a part of the plaintiff's affidavit.

Needless to say it would have been prudent for Ms Chacko to have particularized the source of her information explicitly in her affidavit as this would have alleviated a lot of anxiety for both parties and would have certainly determined the fate of the plaintiff' s affidavit once and for all.

However the omission to do so should not preclude this court from accepting the said affidavit even in its present form, since after a critical appraisal of the affidavit and after considering the due weight to be attached to it bearing in mind the authorities cited, this court is satisfied that Ms Chacko's affidavit is plausible and acceptable.

Therefore, Mr Robert Lai's objection to the failure by Ms Chacko to mention the source of information in her affidavit provides barren ground in which to attempt to nullify the plaintiff's affidavit.

Based on the foregoing the defendant's appeal in encl 18 is dismissed with costs.

Order accordingly.

Reported by Jafisah Jaafar